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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1029

KENNECOTT COPPER CORPORATION, *Petitioner*,

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kennecott Copper Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 28, 1975.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the slip opinion appears in the Appendix hereto.

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 28, 1975. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the provisions of the Clean Air Act, the Administrator of the Environmental Protection Agency may lawfully disapprove a State implementation plan and substitute his own Federal plan, on the ground that, although the State plan provides for the attainment and maintenance of the national ambient air quality standards, it does so by reliance on emission control strategies other than the one preferred by EPA.

STATUTORY PROVISIONS INVOLVED

Section 110(a)(1) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(1), requires each State "to adopt and submit to the Administrator * * * a plan for implementation, maintenance and enforcement of" every primary and secondary national ambient air quality standard within the State. Section 110(a)(2), 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), provides in pertinent part:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

* * *

STATEMENT OF THE CASE

One of the air pollutants for which the Administrator of the Environmental Protection Agency has established national primary and secondary ambient air quality standards pursuant to Section 109 of the Clean Air Act, as amended, 84 Stat. 1679, 42 U.S.C. 1857c-4, is the odorless, invisible gaseous substance, sulfur dioxide. Among those man-made processes that produce large volumes of this gas is the smelting of copper, which is generally derived from a sulfide ore. A major source of sulfur dioxide emissions in the State of Nevada is the copper smelter owned and operated by petitioner Kennecott Copper Corporation in the eastern portion of the State.

In accordance with Section 110 of the Act, 84 Stat. 1680, 42 U.S.C. 1857c-5, the State of Nevada adopted

an implementation plan for the control of sulfur dioxide emissions from Kennecott's smelter. This plan required Kennecott to employ control measures that would reduce stack emissions of sulfur dioxide by 60 percent of the sulfur contained in the input ore. Aided by enhanced atmospheric dispersion from a recently completed 750-foot smokestack, this emission reduction would enable the smelter to achieve compliance with national ambient air quality standards for sulfur dioxide on all but a few days of the year.

The days on which the 60-percent emission reduction would be insufficient are those on which unusual meteorological conditions prevent normal dispersion of sulfur dioxide, causing ground-level concentrations to exceed short-term standards. On such occasions, emissions must be reduced still further by curtailing production or varying operation of the smelter in some way, such as feeding it standby supplies of lower-sulfur ore. By means of a computerized monitoring system, the buildup of these adverse atmospheric conditions can be predicted with sufficient reliability to enable the smelter operator to take the steps necessary to avoid violating the short-term standards. The Nevada plan required Kennecott to install and implement such a system, sometimes referred to as a "supplementary control system" (or "intermittent control system").

The State of Nevada duly submitted its plan to EPA for approval pursuant to Section 110(a). On February 6, 1975, EPA announced that it was disapproving key portions of Nevada's plan, and it promulgated substitute provisions in their stead, 40 Fed. Reg. 5508, 5511. EPA did not question that the emission reductions provided for in the State plan would enable Kennecott to achieve compliance with applicable standards.

Indeed, EPA's plan was in most respects substantially the same as the State's plan; it required Kennecott to reduce stack emissions by 60 percent and to make further reductions through use of a supplementary control system whenever the short-term standards would otherwise be violated.

There was, however, one major difference between EPA's plan and Nevada's. EPA found the Nevada plan "unapprovable" because its strategy for achieving the national standards depended for the indefinite future on Kennecott's use of a tall stack and application of a supplementary control system. It is EPA's position that such measures may not be a permanent part of a State's control plan because they do not effect "constant emission reduction," which is EPA's "preferred strategy for attaining and maintaining the standards" (40 Fed. Reg. at 5510).[1] At the same time, EPA recognized that the application of "constant emission reduction" technology capable of achieving the national standards at Kennecott's smelter is not now "economically feasible" (*ibid.*).

EPA estimated that, to achieve the national standards *without* reliance on a tall stack and a supplementary control system, Kennecott would have to reduce stack emissions by some 86 percent. Accordingly, EPA's substitute plan added the requirements (a) that, at such time as suitable "constant emission reduction" equipment becomes available, it must be applied to Kennecott's smelter to reduce emissions by 86 percent, and (b) that Kennecott must pursue "a

[1] EPA's thesis is that, while tall stacks reduce ground-level concentrations, they do not of themselves reduce emissions; and, while supplementary control systems bring about temporary reductions in emissions, they do not do so continuously.

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research program to develop and apply" such equipment (40 Fed. Reg. at 5516). In the meantime, Kennecott would be permitted to operate exactly as it would have under the State plan, subject to EPA's approval and periodic review of its research and development program and the operation of its supplementary control system.

Because Kennecott's Nevada smelter is too marginal economically to justify the additional expenditures and open-ended commitments contemplated by EPA (see 40 Fed. Reg. at 5509), Kennecott sought judicial review of the agency's substitute plan. Within thirty days after promulgation of the regulations containing the Federal plan, Kennecott filed its petition for review of the Administrator's action in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 307(b)(1) of the Clean Air Act, 84 Stat. 1707, 42 U.S.C. 1857h-5(b)(1). The State of Nevada intervened in support of Kennecott's position. In its argument to the court, Kennecott contended that, where a State implementation plan provides for attainment and maintenance of the national standards, Section 110(a)(2) of the Act does not authorize the Administrator to disapprove the State's choice of emission control strategies.

On November 28, 1975, the Court of Appeals rendered its decision. The court concluded that Section 110(a) (2) (B) expresses a "preference" that, to the extent possible, air quality standards be met by "emission limitations." To qualify as an "emission limitation," the court felt, a control measure must effect *reductions* in emissions and must do so *continuously*. Finding that the tall stack and supplementary control system strategies do neither, the court held that a

State implementation plan cannot rely on those strategies to meet air quality standards when suitable "constant emission reduction" measures are or become available. On that basis, the court affirmed the Administrator's disapproval of the Nevada plan and his promulgation of a substitute Federal plan.

REASONS FOR GRANTING THE WRIT

This Court should exercise its discretionary jurisdiction to review the decision of the Court of Appeals in this case. The opinion below interprets a Federal statute in a manner directly conflicting with this Court's recent decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). Furthermore, the court below has decided an important issue of Federal law that should be finally resolved by this Court.

I. The Decision Below Is in Conflict with This Court's Recent Interpretation of the Clean Air Act.

The court below held that, although the Nevada implementation plan provides for the attainment and maintenance of applicable air quality standards, the Administrator may nevertheless disapprove that plan because he disagrees with the State's choice of emission control strategies. That holding is squarely in conflict with this Court's landmark decision, rendered only nine months ago, in *Train* v. *NRDC, supra.* In that case, on the basis of an exhaustive analysis of the language and legislative history of the Clean Air Act, the Court concluded that Section 110(a)(2) of the Act *mandates* the approval of any State plan that provides for the achievement of national standards and meets the minimum conditions laid down in Section 110.

The Court's opinion sets forth its interpretation of Section 110(a)(2) simply and forcefully:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies the section's other general requirements. [421 U.S. at 79; emphasis in original.]

Recognizing that one of these "other general requirements" is that a plan include "emission limitations" (Section 110(a)(2)(B)), the Court went on to declare:

> *The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations* if they are part of a plan which satisfies the standards of § 110(a)(2) * * *. Thus, *so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.* [*Ibid.;* emphasis supplied.]

This Court's interpretation of Section 110(a)(2) would be seriously undercut if the decision of the lower court is allowed to stand. In essence, what that court did was to construe the term "emission limitations" in such a way as to give the Administrator of EPA a substantial veto over the States' decisions as to control strategy. It held that, in requiring each State plan to include "emission limitations," Section 110(a)(2)(B) really meant "constant emission reduction" measures, and that a State plan must rely on such measures to the extent that EPA considers them "economically feasible." Since the lower court also endorsed EPA's narrow view as to what qualify as "constant emission

reduction" measures, its decision would hand EPA pervasive control over the States' choices of emission limitations.

The Court will search the lower court's opinion in vain for any explanation as to how either the Act or its legislative history justifies a holding that "emission limitations" are confined to measures that *reduce* emissions and that do so *continuously*. Such a restrictive definition is plainly inconsistent with this Court's description of "emission limitations" in *Train* v. *NRDC*, *supra*:

> "[E]mission limitations" * * * are *regulations of the composition of substances* emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and *which if enforced should result in ambient air which meets the national standards.* [421 U.S. at 78; emphasis supplied.]

Least of all can any support for the lower court's contrived definition be found by reference to any reputable dictionary or to "normal usage" (see 421 U.S. at 89).

The lower court's departure from this Court's interpretation of the Act is all the more egregious for its having uncritically embraced EPA's notions as to what measures constitute "constant emission reduction" measures. The court opined that neither a tall stack nor a supplementary control system "assures a reduction in the quantity of the pollutant eventually emitted" (Appendix, p. 12a, *infra*). This approach ignores the fact that, in the Nevada plan, those measures were an integral part of an emission control strategy that included a *continuous 60 percent reduction* in emissions (supplemented by additional reductions as

required), and that these reductions would assure compliance with applicable national standards. Thus, if Nevada's plan does not include "emission limitations" that produce "constant emission reductions," it is difficult to visualize one that would.

The lower court's construction of Section 110(a)(2) would frustrate the will of Congress as perceived by this Court in at least three important ways. *First,* as we have seen, it would give EPA dominion over the setting of emission limitations far beyond anything intended by the legislature. This Court stated in *Train* v. *NRDC, supra,* that EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met" (421 U.S. at 79). The decision of the lower court would promote EPA to the leading role in that vital process without the sanction of Congress.

Second, and by the same token, the lower court's interpretation would sharply diminish the discretion the States were given by the Act to decide what emission control strategies best meet their local needs. In *Train* v. *NRDC, supra,* this Court stated its belief that

> Congress, consistent with its declaration that, "Each State shall have the primary responsibility for assuring air quality" within its boundaries, § 107(a), left to the States considerable latitude in determining specifically how the standards would be met. [421 U.S. at 86-87.]

If all emission limitations must produce "constant emission reductions" (as defined by EPA), and if all implementation plans must rely on such measures to

the extent that EPA considers their use "feasible," and if other measures (such as tall stacks and supplementary control systems) on which EPA frowns may not be relied upon, then the States are left with precious little "latitude," indeed, in developing their own strategies for meeting air quality standards.

Third, the lower court's decision would write a technology-forcing policy into Section 110(a)(2) that was never intended by Congress. In *Train* v. *NRDC*, *supra*, this Court taxed the Fifth Circuit for having failed to consider "that so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments" (421 U.S. at 91). That precept could hardly be more literally applicable than it is to the present case. Although Nevada's control strategy would concededly result in the attainment and maintenance of national standards, Kennecott must nevertheless conduct an EPA-supervised research program to develop improved emission-control technology. Much as EPA may wish to impose such technology-forcing requirements, they find "no basis in the present Clean Air Act."

There is, in short, no way in which the decision of the court below can be reconciled with this Court's authoritative interpretation of Section 110(a)(2) in *Train* v. *NRDC*, *supra*. The Court should grant a writ of certiorari for the purpose of resolving this clear conflict.[2]

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[2] There is also a substantial conflict between the decision below and several decisions of other courts of appeals, one of which is now before this Court for review. The lower court's decision that State plans must rely on "constant emission reduction" measures to the extent "economically feasible" (see Appendix, p. 2a, *infra*)

II. The Court Below Decided an Important Issue of Federal Law that Should Be Finally Resolved by This Court.

The provision that the decision below interprets—Section 110(a)(2) of the Clean Air Act—is one of the most significant provisions of that important statute. In setting forth the minimal elements that a State implementation plan must include to gain Federal approval, Section 110(a)(2) plays a crucial part in defining the respective roles of State and Federal authorities in the common effort to achieve clean air. Regardless of whether the lower court's interpretation of that provision is correct, there can be no question that it alters the basic distribution of pollution-control responsibilities as between the State and Federal Governments. On that basis alone, the decision below should be reviewed by this Court.

Moreover, the decision of the court below has practical implications far transcending the particular facts of the present case. The court's holding that "constant emission reduction" measures must be used to the extent available—even where not needed to assure compliance with national standards—would, if gener-

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necessarily assumes that EPA will consider economic feasibility in deciding whether to approve a plan under Section 110(a). However, other courts have held that economic and technological feasibility are not proper factors for consideration at the approval/disapproval stage, *e.g.*, *Indiana & Mich. Elec. Co.* v. *EPA*, 509 F.2d 839, 844 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), and EPA has taken the position before this Court that "the mandatory wording of the statute indicates that feasibility considerations are irrelevant under Section 110(a)(2) * * *," Respondent's Brief, p. 16, in *Union Elec. Co.* v. *EPA*, No. 74-1542 (Oct. Term 1975); see also Petition for Writ of Certiorari in *EPA* v. *Duquesne Light Co.*, No. 75-736 (Oct. Term 1975).

ally applied, tremendously increase pollution-control costs for American industry, especially in the metal smelting and electric power sectors. EPA itself has acknowledged that the issue presented by this case is "one that will have broad national significance" (Respondent's Brief, p. 7, *Kennecott Copper Corp.* v. *Train,* 9th Cir. No. 75-1335).

Finally, the essential question presented here is one that is bound to recur until it is finally put to rest by this Court. It has already arisen in two other circuits, see *Natural Resources Defense Council, Inc.* v. *EPA,* 489 F.2d 390 (5th Cir. 1974), *reversed in part,* 421 U.S. 60 (1975); *Big Rivers Elec. Corp.* v. *EPA,* 523 F.2d 16 (6th Cir. 1975). Petitions for a writ of certiorari to review the latter decision have been filed by a group of private electric power utilities (No. 75-774, Oct. Term 1975) and by the Tennessee Valley Authority (No. 75-787, Oct. Term 1975) and are still pending before the Court. There is every reason to expect that further efforts will be made in still other circuits to obtain relief from EPA's "constant emission reduction" policy.

Thus, even if the lower court's decision were not in conflict with this Court's opinion in *Train* v. *NRDC, supra,* it would be one that this Court should review. It involves an issue that is important to the administration of a key Federal statute, an issue that has broad significance for American industry, an issue that will continue to arise until it is definitively resolved. The Court should grant a writ of certiorari to settle this question once and for all.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 1976

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNECOTT COPPER CORPORATION, *Petitioner,* vs. RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *Respondent.*	No. 75-1335 OPINION

[November 28, 1975]

On Petition for Review of an Action of the Administrator of the Environmental Protection Agency

Before: TUTTLE,* KOELSCH, and BROWNING, Circuit Judges.

BROWNING, Circuit Judge:

Kennecott Copper Corporation[1] petitions for review of an order of the Environmental Protection Agency (EPA) rejecting a portion of the State of Nevada's implementation plan under the Clean Air Act[2] relating to control of sulfur dioxide (SO_2), and substituting provisions formulated by EPA. The problem arises from a single source of SO_2

* Honorable Elbert Parr Tuttle, Senior United States Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

[1] The State of Nevada intervened in support of Kennecott.

[2] 42 U.S.C. § 1857 et seq. Jurisdiction of this court is under 42 U.S.C. § 1857h-5(b)(1) (regarding petitions for review of orders of the administrator promulgating plans under § 1857c-5(c)).

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emissions in Nevada—Kennecott's copper smelter at McGill in White Pine County.[3]

EPA based its order upon an interpretation of the Clean Air Act which requires that national air quality standards be met by continuous emission limitations to the maximum extent possible, and that intermittent controls and dispersion systems be used only when continuous emission controls are not economically feasible. This court denied Kennecott's request for a temporary injunction against enforcement of the substitute plan promulgated by EPA but expedited Kennecott's appeal. We affirm EPA's order.

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[3] For those not acquainted with the copper smelters' problem of controlling sulfur dioxide emissions, a few facts will help put the matter in perspective[.] Most copper produced in the U.S. is obtained from sulfide ores. The average copper concentrate contains about one ton of sulfur for each ton of copper, and in the smelting process this sulfur is driven off, largely in the form of sulfur dioxide. Each ton of sulfur produces two tons of sulfur dioxide which is emitted in gas streams of varying concentrations.

Muth, *Origins and Current Status of Sulfur Oxide Emission Standards for Nonferrous Smelters, reprinted in Implementation of the Clean Air Act Amendments of 1970, Hearings before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works, 92d Cong., 2d Sess.*, at 553 (1972) [hereinafter cited as 1972 Oversight Hearings].

About 90% of the sulfur dioxide is captured by a smelter's gas collection system and is vented into the atmosphere through smokestacks. The remaining approximately 10% escapes the smelter as "fugitive emissions." *See* Brief of Petitioner Kennecott at 5 n.1.

Senator Eagleton explained the importance of sulfur oxide emissions from copper smelters as follows:

> In Clean Air Act implementation, the copper industry has a significant role. Smelters annually pour 4 million tons of sulfur oxide (SO_2) [sic] into the atmosphere. The SO_2 from copper smelters constitutes one-ninth of the total SO_2 problem with steam generators for electric power the largest source SO_2 pollution—20 million tons annually. SO_2 causes about $8.5 billion damages annually.

1972 Oversight Hearings, *supra* at 435.

I

Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4, requires EPA to promulgate national primary and second air quality standards.[4] Section 110 of the Act, 42 U.S.C. § 1857c-5, applicable to existing sources of pollutants such as Kennecott's McGill smelter,[5] provides that the states must devise plans to implement, maintain, and enforce these national standards. EPA must approve state implementation plans if they are adopted after reasonable notice and hearing, and meet other specified requirements. EPA must disapprove any state plan that does not comply with the statute, and propose and adopt a plan of its own. 42 U.S.C. § 1857c-5(c)(1).

EPA approved the provisions of Nevada's implementation plan relating to control strategy except those involving control of SO_2 at Kennecott's McGill smelter, the sole stationary source of this pollutant in the Nevada Intrastate Air Quality Control Region.[6] Nevada submitted an amended plan.[7] EPA rejected the state's amendments, and proposed,[8] and eventually adopted,[9] a plan of its own.

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[4] The "primary standard" fixed by EPA is that "requisite to protect the public health." 42 U.S.C. § 1857c-4(b)(1). The "secondary" standard "shall specify a level of air quality [which] is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [an] air pollutant in the ambient air." 42 U.S.C. § 1857c-4(b)(2).

[5] The principal question presented in this case would not arise if the McGill smelter were a proposed facility rather than an existing one. Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6, provides that a *new* source of pollutant emissions must utilize the best available technology to reduce emissions without regard to air quality standards.

[6] 37 Fed. Reg. 10879 (May 31, 1972).

[7] 39 Fed. Reg. 38104-05 (Oct. 29, 1974).

[8] *Id.*

[9] 40 Fed. Reg. 5511 (Feb. 6, 1975).

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The amended Nevada plan provided for a 60 percent reduction of SO_2 emissions from the McGill smelter by installation of a plant to convert SO_2 to sulfuric acid. When weather conditions are so adverse that the 60 percent reduction in emissions resulting from operation of the acid plant would not be sufficient to maintain national air quality standards, the Nevada plan provided for reducing the level of production at the smelter.

EPA rejected the Nevada plan on the ground that an 86 percent reduction of SO_2 emissions from the McGill smelter was required to achieve air quality standards. EPA recognized that it was not presently economically feasible to install an acid plant or other constant emission control that would reduce SO_2 emission from the McGill smelter more than the 60 percent contemplated by the Nevada plan. The EPA plan therefore provided that, as an interim measure, Kennecott might use continuous emission reduction technology capable of reducing emissions by 60 percent, together with such other controls (including reducing production and use of a tall stack) as might be needed to maintain national air standards.[10] However, EPA's plan also provided that, until full compliance with national air quality standards is achieved entirely by means of continuous emission reduction,[11] Kennecott must undertake a research program to improve continuous emission control technology,[12] and must adopt such improved technology as it becomes available for use at the McGill smelter on an economically feasible basis.[13]

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[10] 40 C.F.R. § 52.1475(e)(7); 40 Fed. Reg. 5515 (Feb. 6, 1975).

[11] 40 C.F.R. § 52.1475(e)(15); 40 Fed. Reg. 5517 (Feb. 6, 1975).

[12] 40 C.F.R. § 52.1475(e)(13) & (15)(i)(b); 40 Fed. Reg. 5516 & 5517 (Feb. 6, 1975).

[13] In the preamble to its Nevada SO_2 regulations EPA stated:

> [T]he selective use of Supplementary Control Systems (systems which limit pollutant emissions during periods when meteorological conditions are conducive to ground level con-

Kennecott's basic position is that EPA is not authorized to require continuous emission reduction techniques in preference to intermittent controls or other methods for dispersion, or dilution, of pollutants. Kennecott contends that EPA must approve a state implementation plan that provides for any combination of continuous emission controls and alternative control systems devised by the state, so long as the state plan will attain and maintain national air quality standards within the statutory time periods.

This view of the statute underlies Kennecott's opposition to EPA's requirement that Kennecott engage in research to develop and apply constant emission control technology.[14] It is also the principal source of Kennecott's

centrations in excess of the National Ambient Air Quality Standards) to attain and maintain the ambient standards is consistent with the Clean Air Act when the only alternatives are permanent production curtailment, shutdown, or delays in the attainment of the national standards. . . .

* * * * *

EPA will approve such measures as intermittent production curtailment and use of dispersion techniques, including tall stacks, as an addition to available constant control measures, until such time as the treatment of weak gas streams can be accomplished through reasonable retrofit control techniques. Evaluation of the availability of constant control techniques which may be developed in the future will be made using the same criteria as were used in developing these regulations. Namely, [Supplementary Control Systems] will continue to be allowed where permanent production curtailment, shutdown or delays in attainment of national standards are the only other alternatives.

40 Fed Reg. 5508, 5510 (Feb. 6, 1975).

[14] This is the only ground upon which Kennecott challenges EPA's requirement that Kennecott undertake a research program to develop improved continuous emission control technology and adopt such technology when it is economically practicable. Kennecott does not argue, for example, that even if EPA may require use of continuous emission reduction controls in preference to intermittent controls or controls that dilute pollutants, EPA is nonetheless limited to imposing requirements that are practicable

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objection to EPA's determination that an 86 percent reduction in SO_2 emissions from the McGill smelter is required to meet national air quality standards. EPA's calculation rests upon measurements made prior to the installation of a new 750-foot tall smokestack at McGill. Kennecott submitted data to EPA indicating that the new tall stack resulted in a 92 percent decrease in ground level SO_2 concentrations.[15] EPA refused permanent credit for this reduction because, in EPA's view, the statute requires use of continuous emission reduction technology, as opposed to dispersion techniques, whenever economically feasible.[16]

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in light of the state of the art, and of the economy, when the implementation plan is promulgated. Kennecott appears to concede that if EPA can require that continuous emission reduction controls be used so far as practicable, EPA may also impose reasonable conditions to assure the development and adoption of such controls in the future. Nor does Kennecott argue that the research effort required by EPA is an unreasonable one; nor could it, since the nature and scope of the program has yet to be defined.

[15] 40 Fed. Reg. 5509 (Feb. 6, 1975) (col. 3).

[16] EPA apparently allows full credit for the diluting effect of smokestacks in existence before the first implementation plans were filed in January 1972. For stacks built after that date, but before the decision in Natural Resources Defense Council, Inc. v. Train, 489 F.2d 390 (5th Cir. 1974), EPA allows credit for the effect of a stack no greater than two and a half times the height of the facility and nearby obstructions. *See* Air Programs Office, EPA, Region IV, Evaluation of the Georgia Control Strategy, June 21, 1974, revised Mar. 31, 1975, at 2-3; Brief of Respondent at 41-42. Kennecott was given credit for the dispersion effect of a stack two and a half times the height of its McGill smelter. The lawfulness of this allowance is not challenged and is not before us. We also need not consider whether EPA acted lawfully in allowing full credit for the actual dispersal effect of tall stacks built before the initial implementation plans were filed. The considerations that might justify these exceptions to the general requirement that emission reduction techniques be used so far as practicable are not applicable to Kennecott's new stack at McGill.

Kennecott also challenges EPA's calculation of the percentage reduction in emissions required at McGill because EPA used a

II

EPA bases the requirement of constant emission controls upon section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2)(B).[17] This subsection provides that EPA shall approve a state implemention plan if "it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures *as may be necessary* to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls; . . ." (emphasis added).

"linear rollback method" which EPA itself had labeled inappropriate in some circumstances. As we understand the record, the inadequacy acknowledged by EPA is that the method may not take account of higher levels of pollution that occur at ground points other than those at which monitoring stations are located. This deficiency favors the pollutor. Furthermore, meteorological data for air dispersion modeling is unavailable for McGill. Brief for Respondent at 43-44. The rollback method cannot be characterized as arbitrary or capricious in light of existing scientific knowledge. Texas v. EPA, 499 F.2d 289, 301 (5th Cir. 1974). *See* Air Quality & Stationary Source Emission Control, Report by the Commission on Natural Resources, National Academy of Sciences, National Academy of Engineering, Natural Research Council, prepared for Sen. Comm. on Public Works, Sen. Doc. 94-4, 94th Cong., 1st Sess., at 242-45 (1975) [hereinafter cited as *Air Quality Report*].

[17] EPA also argues that the policy stated in § 101(b)(1) of the Act, 42 U.S.C. § 1857(b)(1), "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," authorizes EPA to restrict the use of intermittent controls with respect to SO_2 because of the potentially dangerous effects of aerosol sulfuric acid and sulfates, the end products of atmospheric SO_2 reactions even at SO_2 concentration levels below those permitted by national air quality standards. The dangers and uncertainties are outlined in *Environmental Protection Agency, Health Consequences of Sulfur Oxides: A Report from CHESS*, 1970-1971, at 18 & 20 (May 1974); *Air Quality Report*, *supra* note 14, at XVII-XVIII, 532-33. It is unnecessary to consider this possible alternative source of authority.

EPA reads the phrase "as may be necessary" as modifying only "such other measures," and not "emission limitations." In EPA's view, measures other than emission limitations are therefore permissible only if "necessary" to achieve applicable air quality standards; such "other measures" are not "necessary" if economically feasible emission limitation technology is available.

EPA supports its interpretation of section 1857c-5 (a)(2)(B) by references to the language and legislative history of the Clean Air Act Amendments of 1970. EPA relies upon the fact that an option to utilize intermittent controls or tall stacks carries the potential for evasion of the intent of Congress that emission limitations be included in implementation plans. EPA invokes the policy of nondegradation of the quality of the nation's air, implied from the Act.[18] EPA also draws support from the Supreme Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and from the provisions and legislative history of the Energy Supply and Environmental Coordination Act of 1974.

The Courts of Appeals for the Fifth and Sixth Circuits have adopted the interpretation of section 1857c-5 (a)(2)(B) urged by EPA. *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390 (5th Cir. 1974), *reversed in part on other grounds sub nom., Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); *Texas* v. *EPA*, 499 F.2d 289, 311 (5th Cir. 1974); and *Big Rivers Electric Corp.* v. *EPA*, — F.2d — (6th Cir. 1975).

In *Natural Resources Defense Council*, the Fifth Circuit held that EPA may approve tall stack dispersion techniques in a state implementation plan "only (1) if it

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[18] The nondegradation policy requires that existing air quality be maintained even if degradation would not reduce the quality of the air below national standards. Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 408 (5th Cir. 1974). This court has recognized that the Clean Air Act intends such a policy. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 913 (9th Cir. 1974).

is demonstrated that emission limitation regulations included in the plan are sufficient *standing alone*, without the dispersion strategy, to attain the standards; or (2) if it is demonstrated that emission limitation sufficient to meet the standard is unachievable or infeasible, and that the state has adopted regulations which will attain the maximum degree of emission limitation achievable." 489 F.2d at 410 (emphasis in original).[19] We agree, in general, with the Fifth Circuit's analysis (489 F.2d at 403-09) of the history and contents of the Clean Air Act Amendments of 1970 leading to this conclusion.[20]

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[19] Prior to the Fifth Circuit's decision in *Natural Resources Defense Council*, EPA vacillated in its interpretation of the statute "[i]n the face of strong industry and Administration pressure." Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, 4 Ecology L.Q. 441, 457-58 (1975). Thereafter EPA consistently urged this construction, as it has in this case.

[20] Kennecott's attempt to distinguish the Fifth Circuit decision on the ground that the Georgia plan relied entirely upon dispersion techniques is unavailing; the Georgia plan, like that of Nevada, included the use of substantial emission reduction measures. 489 F.2d at 409.

Kennecott contends that the Fifth Circuit erred in reading the words "emission limitations" in § 1857c-5(a)(2)(B) to exclude emission dispersion and intermittent controls. Any other reading would render the words "other measures" surplusage. The Fifth Circuit's reading also best serves the congressional purpose to protect and enhance the quality of the nation's air. A summary of the 1970 amendments presented to the Senate by Senator Muskie distinguishes between emission limitations and "interim control measures." 116 Cong. Rec. 42384 (1970) (col. 3). Senator Muskie later expressed the view that emission reductions are required by the Act. 119 Cong. Rec. S 10941 (daily ed. June 12, 1973). William Ruckelshaus, EPA's first Administrator, indicated that "emission limitations" meant emission reductions. 1972 Oversight Hearings, *supra* note 3, at 265, 266.

Despite Kennecott's contrary arguments, we think the Fifth Circuit properly viewed the provisions §§ 1857c-6, 1857c-7, and 1857c-6(d), as supportive of a construction of § 1857c-5(a)(2)(B) reflecting a preference for continuous emission reductions. These provisions do not point unerringly to that result, of course, but

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In *Big River Electric Corp.*, the Sixth Circuit extended the Fifth Circuit's decision to intermittent emission con-

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the supporting inferences the Fifth Circuit drew from them are justified.

We do not attach the same significance the Fifth Circuit does to the use of the words "emission standard or limitation" in the statement of the authorized subject matter of citizen enforcement actions in § 1857h-2(a)(1). It may be argued (as the Fifth Circuit does) that since citizen enforcement actions are limited to emission limitations, Congress must have intended that such limitations be used whenever possible; but it may also be argued (as Kennecott does) that Congress must have intended the term "emission limitations" to include all types of controls. Both arguments assume that the term has the same meaning in § 1857c-5(a)(2)(B) as it has in § 1857h-2(a)(1). However, if the overall purpose of Congress would be better served by construing the term to include intermittent controls and tall stacks in § 1857h-2(a)(1) and to exclude them in § 1857c-5(a)(2)(B), there is no reason this reading cannot be adopted. Bailey v. United States, 360 F.2d 113, 116 (9th Cir. 1966); Grand Lodge of Int'l Ass'n of Machinists v. King, 335 F.2d 340, 344 (9th Cir. 1964). The use of "other measures" in § 1857c-5(a)(2)(B) and its omission in § 1857h-2(a)(1) supports such a construction. Senator Muskie, who clearly thought § 1857c-5(a)(2)(B) expressed a preference for emission reduction (120 Cong. Rec. S 10409 (daily ed. June 12, 1974), also thought a private citizen could sue to enforce provisions requiring intermittent controls. *Id.*

Kennecott's argument that use of a tall stack reduces ground level concentrations, or "dilutes" the pollutant and therefore is not inconsistent with a policy of nondegradation of air quality, ignores the undeniable fact that a tall stack does nothing to reduce emissions because it introduces all of the pollutant into the atmosphere. *See* 1972 Oversight Hearings, *supra*, note 3, at 638 (explanation of tall stacks by Mr. Crawford).

Kennecott admits that a "Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970" (*see* 116 Cong. Rec. 42384 (Dec. 18, 1970)) submitted to the Senate by Senator Muskie "seem[s] to reflect a view that all sources should be subject to emission limitations." Petitioner's Brief at 39. This conceded, it is not circular (as Kennecott suggests) to argue that § 1857c-5(a)(2)(B) must be interpreted to prefer emission limitations in order to prevent evasion of the intent of Congress, since state plans might otherwise rely wholly on less expensive intermittent controls and dispersion techniques to achieve air quality standards.

trol systems, holding that section 1857c-5(a)(2)(B) authorizes EPA to reject state plans providing for the use of intermittent emission control systems without a showing that constant emission controls are unavailable.[21] The Sixth Circuit based its conclusion upon the Fifth Circuit's analysis of the Clean Air Act Amendments of 1970, and upon the Supreme Court's discussion of section 1857c-5-(a)(2)(B) in *Train* v. *Natural Resources Defense Council*. *Train* parses section 1857c-5(a)(2)(B) as EPA's interpretation suggests (421 U.S. at 67), and adopts the position that a state plan must include provisions regulating the composition of substances emitted from a given source. 421 U.S. at 78. The Sixth Circuit noted that since composition means "kind and amount," *Train* recognizes that a state plan must limit the amount of a pollutant. — F.2d at —.

We agree with the Sixth Circuit that *Train* adds significant support to EPA's interpretation of section 1857c-5-(a)(2)(B) as expressing a preference for emission limitations.[22] Intermittent control systems (such as those re-

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[21] The Fifth Circuit stated in dicta that intermittent control systems were dispersion techniques subject to interdictions similar to those imposed on tall stacks. 489 F.2d at 394 n.2.

[22] Kennecott argues EPA cannot require Kennecott to develop and adopt improved methods of emission reduction in view of the Supreme Court's statement in *Train* that "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." 421 U.S. at 91. The Supreme Court was referring to modification of source-by-source emission limitations fixed by the state. EPA must approve such modifications so long as the state plan as a whole provides for a mix of emission limitations from all sources sufficient to meet national air quality standards. The *Train* holding is that EPA may not raise the emission limitation fixed by the state for a particular source to force technological improvement as to that source so long as the emission limitations set by the state for all sources are sufficient to meet national air quality standards. The Supreme Court was not ad-

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stricting production, or utilizing less polluting fuels, during periods of adverse weather) do limit the amount of pollutant emitted while such controls are being applied. However, the reliability and enforceability of such controls is questionable; they may not be implemented when they are in fact needed.[23] Moreover, there is no assurance that temporary reductions in emissions resulting from such controls will not be balanced, or even exceeded, by an increase in the amount of pollutant emitted when weather conditions improve and production is increased to make up for prior losses, or more polluting fuels are again used. Thus, intermittent controls, like tall stacks, may only disperse the pollutant rather than reduce it. Tall smokestacks disperse a pollutant through greater quantities of air; intermittent control systems disperse a pollutant through longer periods of time. Neither assures a reduction in the quantity of the pollutant eventually emitted.[24] Under section 1857c-5-

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dressing the question presented in this case; that is, whether EPA may seek to force development of technology to the extent necessary to enable national standards to be met by emission limitation controls, rather than by other measures.

[23] *See* 37 Fed. Reg. 15095 (July 27, 1972); 38 Fed. Reg. 25698 (Sept. 14, 1973). *See also* 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (remarks by Senator Muskie).

[24] As an EPA staff paper stated (Cong. Rec. June 12, 1973) (daily ed. at S 10948):

> Depending on the circumstances, [an intermittent control system] may or may not reduce the average long-term emissions. If plant operation is curtailed during poor dispersion conditions, then it may be increased during good conditions to make up for the lost production. Average emissions would be about the same with or without [an intermittent control system] for this situation. If clean fuel is used to reduce emissions during poor dispersion conditions, then average emissions will be reduced somewhat. If fuel with higher sulfur content is used during good conditions, then average emissions could be greater with [an intermittent control system]. It must be concluded, therefore that although [an intermittent control system] employs temporary emission limitation, the long-range control method is that of taking advantage of good dispersion rather than emission reduction.

(a)(2)(B), EPA may require that assurance. We therefore agree with the Sixth Circuit that EPA acted within its authority in refusing to accept intermittent controls as adequate compliance with the statute.

Kennecott presses one argument, based upon the 1970 amendments, not addressed by either circuit. Section 1857c-5(a)(2)(B) is applicable to existing sources of pollutants; section 1857c-6(b)(1)(B) governs new sources. Congress intended the standard applicable to the latter to be the more stringent. Kennecott argues that EPA's interpretation of section 1857c-5(a)(2)(B) would make the new source and existing source standards the same. Kennecott is mistaken. The new source standard requires "the degree of emission limitation achievable through the application of the best system of emission reduction" *without regard to air quality standards.* 42 U.S.C. § 1857c-6(a)(1). In contrast, existing sources, under EPA's view of section 1857c-5(a)(2)(B), need only reduce emissions to the extent necessary to comply with air quality standards. Moreover, existing sources, as opposed to new sources, need adopt only such systems of emission reduction as are economically feasible, so long as interim compliance with air quality standards may be achieved by "other measures." These differences are real. The record discloses that technology capable of reducing SO_2 emissions by 80 percent is available and is now installed at two Kennecott smelters. Such technology has not been required at McGill only because the required investment would be uneconomic at that smelter. *See* note 13.

III

Congress again amended the Clean Air Act in 1974. The Energy Supply and Environmental Coordination Act of 1974 added a new section 119 to the Act, 42 U.S.C. § 1857c-10. The provisions of this amendment assume that section 1857c-5(a)(2)(B) has the meaning attributed to it by the Fifth and Sixth Circuits and by EPA. The legislative history adds further significant support to this interpretation.

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The 1974 Amendments were a response to the 1973 oil embargo and resulting energy crisis. They provide, among other things, for temporary suspension of emission limitations where fuels necessary to compliance become unavailable, or a plant burning oil or gas converts to coal.

A predecessor to the 1974 Amendments was adopted during the first session of the 93d Congress, but was vetoed.[25] The legislative history of the aborted statute throws light on the proper construction of section 1857c-5(a)(2)(B). As it passed the House, the statute contained a provision (originating in the so-called Murphy Amendments) implying that the Clean Air Act did not require emission limitations, and permitting the permanent use of intermittent controls at certain emission sources.[26] This provision did

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[25] 10 Wkly Comp. of Pres. Doc. 289 (1974) (Veto of S. 2589).

[26] Murphy Amendments to H.R. 11450, § 201 (particularly proposed § 119(a)(2)(A)(iii) & (B)(i) of the Clean Air Act): *Compare* 119 Cong. Rec. H 11460 (daily ed. Dec. 14, 1973) *with id.* H 11230 (daily ed. Dec. 12, 1973).

Prior to adoption of the Murphy Amendments the proposed statute provided that the Administrator of EPA could temporarily suspend any stationary source fuel or emission limitation "if the Administrator finds—

. . .

> (iii) that such person has been placed on a schedule which provides for the use of methods which the Administrator determines will assure continuing compliance *with the stationary source fuel or emission limitation* as soon as practicable (but no later than June 30, 1979), which schedule shall include increments of progress toward compliance with such limitation by such date.
>
> (B)(i) Any schedule under subparagraph (A) (iii) shall include a date by which a contractual obligation shall be entered into for an emission reduction system. . . ."

119 Cong. Rec. H 11228 (daily ed. Dec. 12, 1973) (emphasis added).

Congressman Murphy's amendment modified this provision to read as follows:

> (iii) that such person has been placed on a schedule which provides for the use of methods which the Administrator de-

not survive the Conference Committee. As enacted, the Conference substitute permitted use of alternative or intermittent controls only by pollution sources that converted to combustion of coal, and then only under such conditions as "would require incremental steps toward compliance by utilization of low sulfur coal or coal by-products, or by continuous emission reduction systems." [27] The 1973 legis-

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termines will assure continuing compliance with *a national primary ambient air quality standard* as soon as practicable (but no later than June 30, 1979), which schedule shall include increments of progress toward compliance with such standard by such date.

(B)(i) Any schedule under subparagraph (A)(iii) shall include, *if necessary to meet a national primary air quality standard*, a date by which a contractual obligation shall be entered into for an emission reduction system. . . .

119 Cong. Rec. H 11460 (daily ed. Dec. 14, 1973) (emphasis added).

Congressman Murphy declared that "[n]othing in section 110 of the Clean Air Act mandates the use of any particular method of achieving air quality, such as scrubbers or low sulfur fuel." *Id.* at H 11231 (daily ed. Dec. 12, 1973). These views were shared by Congressman Jones of Alabama, *id.* at H 11214, and Congressman Nelsen, *id.* at H 11231. *But see* note 34 *infra*. In passing the House, the Murphy Amendment survived a counter amendment by Congressman Symington who recognized the implications of Congressman Murphy's proposal. 119 Cong. Rec. H 11394-95 (daily ed. Dec. 14, 1973).

[27] The Report of the Conference Committee states (Conf. Rep., S. Rep. No. 93-663, 93d Cong., 1st Sess. 83-84 (1973)):

> The House-passed bill would have permitted the use of so-called intermittent or alternative control strategies as a means of meeting ambient air quality standards if such strategies were determined by the Administrator to be reliable and enforceable. This permission would have applied to both existing sources not affected directly by the energy emergency and sources required to convert to coal under the emergency legislation.
>
> The Senate bill would have permitted revision of existing implementation plans to require use of continuous emission

lation assumed the correctness of EPA's construction of section 1857c-5(a)(2)(B).

The same pattern was repeated with respect to the bill adopted in the next session of the 93d Congress and signed by the President—again Congress assumed that the Clean Air Act is to be construed as requiring the use of continuous emission reduction systems if available, and again Congress rejected an affirmative effort to modify the statute to alter this construction. In March 1974 Russell E. Train, Administrator of EPA, transmitted a proposed bill to the Speaker of the House of Representatives which, in pertinent part, was the same in substance as the statute eventually adopted.[28] Mr. Train also transmitted two proposals advanced by other agencies of the Executive branch which, he wrote, "I do not support." One of these proposals would have rejected the nondegradation policy, collaterally

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reduction systems on any fuel-burning stationary sources affected by shortages of fuels, suspensions or conversions.

The conference agreement does not include either of the foregoing broad provisions. Instead, the conferees decided to limit the application of this provision to those sources which convert to combustion of coal as a result of the energy emergency. The conference substitute requires these converting sources to come into compliance with all plan requirements by 1979 (or 1980, if a postponement is obtained under section 110(f)) in accordance with a schedule which meets requirements of regulations of EPA. These requirements would require incremental steps toward compliance by utilization of low sulfur coal or coal by-products, or by continuous emission reduction systems to permit the combustion of high sulfur coal (or coal with high ash content) in compliance with such plan requirements.

[28] Letter dated Mar. 22, 1974, from Russell E. Train, Administrator of EPA, to Hon. Carl T. Albert, Speaker of the House of Representatives, attached to H.R. Rep. No. 93-1013, 2 U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess., at 3298 (1974). The Administration proposal appears at 4 BNA Env. Rptr. 2004-09 (1974) (current developments).

relevant here.[29] The other, directly relevant, would have amended section 1857c-5 expressly to bar the interpretation of subsection (a)(2)(B) adopted by the Fifth and Sixth Circuits and EPA, and to require the interpretation urged by Kennecott. The proposed bill would have added a new subsection to section 1857c-5 providing that nothing in that section was to be construed "to preclude use of alternative or intermittent control measures" which are reliable and enforceable and "will permit attainment and maintenance of the national ambient air quality standards."[30]

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[29] This proposal read:

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SIGNIFICANT DETERIORATION

Section 101 (b) (1) of the Clean Air Act is amended to read as follows:

"(1) to protect and enhance the quality of the Nation's air resources by establishing, achieving, and maintaining national ambient air quality standards, standards of performance for new stationary sources, and national emission standards for hazardous air pollutants so as to promote the public health and welfare and the productive capacity of the Nation, but nothing in this Act is intended to require or authorize the establishment by the Administrator of standards more stringent than primary and secondary ambient air quality standards;".

4 BNA Env. Rptr. 2010 (1974) (current developments).

[30] The proposal read:

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

INTERMITTENT OR ALTERNATIVE CONTROL MEASURES

Section 110 of the Clean Air Act is amended by adding subsection (h) which reads as follows:

"(h) Nothing in this section shall be construed to preclude use of alternative or intermittent control measures

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Mr. Train described the Administration's proposed bill as a victory over the two proposals favored by other executive agencies, which, he said, would "significantly weaken the Clean Air Act." He pointed out that these two proposals were submitted to Congress by the Administration only as issues to be considered, not as recommended changes. He noted that the proposal regarding intermittent controls, rejected by the Administration, was intended "to allow the use of intermittent control strategies as a permanent method for achieving compliance with stationary source emission standards." Mr. Train reaffirmed EPA's contrary position, stating, "As in the past, EPA will contend that the intermittent controls can be used only as an expedient, temporary control measure."[31]

EPA's position prevailed in Congress as it had within the Executive branch. The 1974 Amendments did not include the proposal approving general permanent use of intermittent controls to achieve national air quality standards,[32] or the proposal rejecting the policy of nondegradation. Intermittent controls were allowed only in carefully limited situations, and then only temporarily. Plants converting from oil or natural gas to coal might obtain an extension of compliance dates but only on condition that

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which the Administrator determines are reliable and enforceable and which he determines will permit attainment and maintenance of the national ambient air quality standards."

4 BNA Env. Rptr. 2010 (1974) (current developments).

[31] 4 BNA Env. Rptr. 1927 (1974) (current developments).

[32] In addition to the bill set out in note 30, Congress had before it a proposal offered by Congressman Nelsen (H.R. 13464) to amend 42 U.S.C. § 1857c-5(a)(2)(B) to provide that intermittent controls were acceptable as permanent alternatives to emission limitations. 120 Cong. Rec. H 1780, E 1376-78 (daily ed. Mar. 13, 1974). The bill died in committee.

they enter into binding contracts for a long term supply of coal that would enable them to meet emission requirements, or contract for continuous emission reduction systems necessary to enable them to achieve the required degree of emission reduction. EPA was empowered to impose such "interim requirements" as were "reasonable and practicable," but the required degree of emission reduction was to be achieved no later than a date certain set by the statute. 42 U.S.C. § 1857c-10(c)(2)(B) & (C). The required degree of emission limitation was fixed by reference to the state implementation plan applicable to the particular plant, but no one suggested that the statutory scheme might be frustrated because such a plan might seek to attain air quality standards by means other than emission reduction. On the contrary, Congress clearly understood that existing law required that air quality standards be achieved by emission reduction, and that other control measures were to be employed only temporarily.

Thus, in the course of presenting the Conference Report on the 1974 Amendments to the Senate, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and manager of the bill in the Senate, pointed out that "intermittent control strategies are permitted as an interim measure applicable to coal conversion" if EPA determined they were enforceable.[33] After expressing his personal doubt as to the enforceability of intermittent controls, Senator Muskie said:

> It is these doubts that lead me to underscore the fact that no one should view limited application of enforceable strategies related to this legislation as a precedent for future legislation *or as a reinterpretation of the requirements of the existing law which bar the appli-*

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[33] 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (1st col.) (emphasis added).

cation of intermittent control strategies as a substitute for emission limitations.[34]

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[34] 120 Cong. Rec. S 10409 (daily ed. June 12, 1974) (3d col.) (emphasis added). *See also* 120 Cong. Rec. S 8014 (daily ed. May 14, 1974).

The statement of Senator Baker, ranking minority member of the subcommittee, in support of the Conference Report, reflects the same understanding that emission limitations must be met by continuous reduction systems (120 Cong. Rec. S 10426 (daily ed. June 12, 1974) (1st col.)):

> I am concerned about the conference report provision that powerplants unable to obtain sufficient low sulfur coal or coal alternatives to meet emission limitations applicable under the law must undertake to obtain continuous emission reduction systems which are capable of meeting these limitations by 1979 while burning high sulfur coal. Although the term "continuous emission reduction system" is broad enough to encompass a broad range of technology, I foresee the possibility that certain specific solutions to the problem of sulfur oxide emissions might receive undue emphasis. For this reason, I want to emphasize that the term is meant to indicate any technology involving advanced techniques of combustion of coal—such as the fluidized-bed process—or after-treatment of combustion gases—for example flue gas desulfurization, better known as scrubber technology.

Senator Baker's statement echoes the view of John Sawhill, a subsequent Administrator of the Federal Energy Office, stated in a May 20, 1974, letter to Chairman Jennings Randolph of the Senate Public Works Committee:

> Specifically, we are concerned with the provisions of section 119(b)(2)(B) that require that plants scheduled to convert must be committed to a compliance schedule that provides a date by which the source must enter into contracts for low sulfur coal or scrubbers. This provision is coupled with section 119(b)(2)(C) that requires plants granted suspensions to come into compliance with emission regulations in a state implementation plan that are in effect on the date of enactment of these amendments.
>
> The requirement concerning contracts for low sulfur fuel or scrubbers would effectively preclude the use of intermittent control systems as an alternative method for achieving compliance. If the Administration's proposal to permit use of intermittent control systems, contained in our March 22

These legislative materials offer convincing evidence that the 93d Congress interpreted the 1970 Amendments to the Clean Air Act to require that air quality standards must be met by continuous emission reduction controls so far as possible.[35] The 1974 Amendments confirm this reading

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amendments to the Clean Air Act, is adopted, this section of H.R. 14368 would have to be amended to conform with it.

120 Cong. Rec. S 10414 (daily ed. June 12, 1974). (Both the Federal Energy Office and EPA claimed to represent the Administration, despite their inconsistent position on whether to permit permanent use of intermittent controls. The Energy Office's proposal was, however, only an alternative.)

Congressman Nelsen had earlier supported the Murphy Amendments, *see* note 26, and had introduced legislation to amend 42 U.S.C. § 1857c-5(a)(2)(B) to permit intermittent controls, *see* note 32. He noted that the "total impact of [new section 119] and the Clean Air Act provisions is to lock in the technology of scrubber systems . . . ." 120 Cong. Rec. H 5002 (daily ed. June 11, 1974). Congressman Nelsen nonetheless voted for the bill because Congress was committed to reexamination of his concerns regarding intermittent controls. *Id. See also* 120 Cong. Rec. S 8018 (daily ed. May 14, 1974) (comments by Senator Randolph) ("[Section 119] would clarify EPA's authority to impose interim requirements that both protect air quality and insure appropriate efforts are taken to secure continuous emission control systems or conforming fuels"). Senator Randolph mentioned the Fifth Circuit's *Natural Resources Defense Council* decision, and was critical only of that portion relating to the granting of variances.

[35] Kennecott's entire response to these materials is a footnote suggestion that the 1974 Act and its legislative history "must be construed in the context of the oil shortage it was intended to deal with, which gave rise to the necessity of permitting the EPA to *impose* [intermittent control] strategies upon states against their wishes and in violation of their state emission limitations *despite* the Clean Air Act's command that states be permitted to opt for stricter emission limitations than would be required to meet national ambient air quality standards" (emphasis in original). Reply Brief of Petitioner Kennecott at 14 n.1.

Giving this circumstance full weight, it does not diminish the significance of the compelling showing that Congress interpreted 42 U.S.C. § 1857c-5(a)(2)(B) as EPA urges us to interpret it. *Accord Air Quality Report, supra* note 14, at 213.

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of the earlier statute by strong implication. In these circumstances, the rule that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight" is appropriately applied. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 669-70 (1st Cir. 1974); *cf. Rath Packing Co.* v. *Becker*, — F.2d —, — (9th Cir. 1975).

IV

Kennecott spent $4,000,000 to implement the Nevada plan, but suspended further construction on the $30,000,000 project pending completion of this review proceeding. Kennecott states that the McGill smelter will only support the expenditures required by the Nevada plan, and that the smelter must close if Kennecott is required, in addition, to conduct research to devise new constant control technology which would be economically feasible at McGill.

EPA's plan requires the same immediate capital outlay as the Nevada plan with which Kennecott has said it can comply. Contrary to Kennecott's contention, EPA's plan would not expose Kennecott to the risk that it would be required to make further capital investments for the installation of uneconomic continuous emission control systems in the future. As EPA has undertaken to assure Kennecott (*see* note 13), under EPA's interpretation of section 1857c-5(a)(2)(B), EPA could not compel Kennecott to install additional emission reduction systems at McGill unless it were economically feasible to do so.

The order of the Environmental Protection Agency is sustained.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1029

KENNECOTT COPPER CORPORATION,
Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM OF THE STATE OF NEVADA IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI

ROBERT LIST
Attorney General
Supreme Court Building
Carson City, Nevada 89710

February 1976

IN THE

Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM OF THE STATE OF NEVADA IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI

The State of Nevada, a respondent herein, by virtue of Rule 21(4) of this Court's Rules, submits this memorandum in support of the petition of Kennecott Copper Corporation for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT

Pursuant to the Clean Air Act, as amended, the State of Nevada adopted an implementation plan for the control of sulfur dioxide emissions from Kennecott Copper Corporation's smelter at McGill, Nevada. The State's plan required that the smelter be fitted with controls that would capture 60% of the sulfur contained in the ore that is fed into the smelter. The supplementary control system, which was part of the control strategy for the facility, would guard against short-term violations of the Nevada ambient air quality standards (which in some cases are more stringent than the national ambient air quality standards) during periods of meteorological conditions adverse to the normal atmospheric dispersion of sulfur dioxide. These provisions assure that the national ambient air quality standards for sulfur dioxide would be attained and maintained at all times.

Nevertheless, the Administrator of the Environmental Protection Agency (hereinafter E.P.A.) in spite of the restrictions placed on the powers granted to him by the Clean Air Act, as amended, disapproved the State's plan and promulgated his own. The only material difference between the Federal plan and the Nevada plan was that the former required that the Petitioner, Kennecott Copper Corporation, conduct a research program for the purpose of developing and installing additional sulfur-capture equipment. The State of Nevada had elected not to include such a requirement in its plan because it was deemed unnecessary to assure compliance with either the national ambient air quality standards or the State standards.

Consequently, when Kennecott sought judicial review of the Administrator's disapproval of the State plan and promulgation of the Federal substitute, the State of Nevada intervened and appeared in support of Kennecott's position. The State contended

that the adoption of the Federal plan violated restrictions on the Administrator's powers specified in the Clean Air Act and infringed upon the State's prerogatives under the Act, and such action could have extremely serious economic consequences for the people of the State. However, the Court of Appeals for the Ninth Circuit affirmed the Administrator's action. Kennecott thereupon filed its petition for a writ of certiorari, seeking review of the lower court's decision by this Court and the State of Nevada hereby supports that petition.

ARGUMENT

It is clear from the statutory language, the legislative history and this Court's previous interpretation of the Clean Air Act, that the states have been assigned the responsibility of determining what means of achieving national (and local where more stringent) ambient air quality standards are best suited to their particular local situation. However, with the support of the decision below, the Administrator of the E.P.A. has now imposed on the states a uniform Federal policy for the control of sulfur dioxide—a policy that applies regardless of whether it is needed for compliance with national standards—a policy that ignores the vast differences in the conditions among the states—a policy whose sole justification is the convenience and ease of enforcement by the E.P.A., definitely not the needs of meeting the ambient air quality standards. Since there is no way in which this action of the Administrator can be reconciled with the terms and intent of the law, a review of the lower court's decision is urgently called for.

The structure of the Clean Air Act recognizes that the interstate nature of free-flowing air warrants the imposition of national ambient air quality standards. However, the widely varying circumstances throughout the Nation require the preservation of state

authority over the means of attaining those standards. This very concept is clearly expressed in Section 107(a) of the Act, 42 U.S.C. 1857c-2(a):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110(a) of the Act, 42 U.S.C. 1857c-5(a) further states that the Administrator *must* approve the state's plan as long as it provides for the attainment of the national standards and meets certain other specified conditions.

The Congressional purpose of allowing the states the freedom to select the means of attaining the national standards was amply confirmed in the legislative debates. Senator Muskie, the leading proponent of the legislation, had this to say (116 Cong. Rec. 42386 [1970]):

> May I say to the Senator that during the deliberations on the bill I have been very much interested in preserving "local option" features, so that State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.

Similarly, after remarking that "the States must set up a plan which must meet the Federal standards," Congressman Staggers, the House manager, observed, (116 Cong. Rec. 19205 [1970]):

> In establishing the emission standards I am sure the States will take into consideration the particular problems of air quality control which exist in particular areas. This question will be left up primarily to the States.

See also, e.g., 116 Cong. Rec. 32902–03, 33114–15, 42520 (1970).

In the leading case interpreting the pertinent provisions of the Clean Air Act, as amended, this Court repeatedly emphasized the freedom which Congress intended the state should have in selecting the appropriate measures for meeting the national standards, *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). The Court stated (421 U.S. at 79) that:

> so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

The Court further asserted that "Congress * * * left to the State considerable latitude in determining specifically how the standards would be met." (421 U.S. at 86–87). Again at page 79, this Court declared that: "[t]he Act gives the Agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satifies the standards of § 110(a)(2) and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c)." (421 U.S. at 79.)

In spite of these clear evidences of the legislative will to the contrary, the E.P.A. has effectively preempted the State's authority to determine the method of controlling sulfur dioxide emissions. It has done so by imposing on the states a uniform Federal policy of achieving a maximum reduction of such emissions nationwide, irrespective of whether such a policy is necessary for the attainment or maintenance of national ambient air quality standards in any particular state. It has applied this policy in Nevada by

requiring that, as the price for its reliance on the State of Nevada's control strategy, Kennecott Copper Corporation must undertake a program for developing and installing further measures for the reduction of sulfur emissions. The E.P.A. has done so without regard to the fact that such a condition is neither required for the achievement of air quality standards in Nevada nor permitted by the authority granted to the Administrator in the Clean Air Act.

The Administrator has shown that he considers his "maximum emission reduction" policy to have nationwide applicability. He has already imposed it on a number of other states, see, *e.g.*, 39 Fed. Reg. 29357, 29358 (1974) (Kentucky); 40 Fed. Reg. 43231, 43232 (1975) (Utah); 40 Fed. Reg. 53584, 53586–87 (1975) (Idaho). In addition, on January 6, 1976, the Administrator issued a "Legal Interpretation and Guideline . . ." setting forth the manner in which the E.P.A. intends to implement this policy wherever the agency deems its application is warranted, see 41 Fed. Reg. 7450 (February 18, 1976). In this Guideline, the E.P.A. specifically identifies its Nevada regulation as an example of the type of condition the agency will impose in the future (*id.* at 7452 n.2).

The decision below, in approving the imposition of the E.P.A.'s "maximum emision reduction" policy on the State of Nevada, is completely contrary to the Clean Air Act's careful separation of functions and powers between the State and Federal governments. It deprives the states of their discretion to determine which control strategies are most responsive to their local problems and their local needs. It reposes in the E.P.A. the power to overrule a state's choice of emission limitations, even where the state's plan assures compliance with all national standards and all statutory conditions. It thus legislates a reallocation of pollution-control responsibilities that is contrary to the mandate of Congress contained in the Clean Air Act, as amended.

By the same token, the decision below is in conflict with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). The Court's opinion in that case was a clear affirmation of the State's primary role in selecting the means by which national air quality standards shall be met. It is vital to the sound administration of the Act—both in Nevada and elsewhere—that the conflict between the lower court's decision and this Court's decision in *Train* be resolved as soon as possible. For that reason, and for all of the reasons set forth in the petition for a writ of certiorari, review of the lower court's decision by this Court is plainly warranted.

CONCLUSION

The State of Nevada supports the petition for a writ of certiorari filed herein and urges this Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROBERT LIST
Attorney General
The State of Nevada

February 1976

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MICHAEL RODAK, JR., CLERK

No. 75-1029

In the
Supreme Court of the United States
October Term, 1975

KENNECOTT COPPER CORPORATION,
Petitioner,

v.

RUSSELL E. TRAIN, Administrator of the
Environmental Protection Agency,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

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March 1976

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In the

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

INTEREST OF AMICUS CURIAE

The Bay Area League of Industrial Associations, Inc. submits this brief in support of Petitioner Kennecott Copper Corporation. Counsel for both petitioner and respondent, Russell E. Train, have consented to the filing of this brief *amicus* by letters which have been presented to the Clerk of the Court pursuant to Rule 42(2).

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The Bay Area League of Industrial Associations, Inc. ("BALIA") is an incorporated league of industrial corporations with manufacturing facilities located in the San Francisco Bay area. BALIA is a party to rulemaking in which the Environmental Protection Agency ("EPA") has proposed formally to disapprove certain provisions of the Bay Area implementation plan solely on the grounds that it permitted ground level monitoring controls, based upon the same rationale as EPA's disapproval of the Nevada regulations involved in this case.

REASONS FOR GRANTING THE WRIT

The decision below involves a question of continuing and overriding importance concerning the implementation of the Clean Air Act which should be reviewed by this Court.

This case is one of several cases in which EPA has made it clear that it would disapprove state implementation plans, although the plans provide for the attainment and maintenance of the national ambient air quality standards, if the plans do not rely upon "constant emission controls" and that EPA will not permit other types of emission controls.

The issues presented in this case are also before this Court in connection with previously filed petitions by a group of affected electric utilities (No. 75-774, October Term 1975) to review the decision of the Court of Appeals in *Big Rivers Electric Corporation* v. *EPA*, 523 F.2d 16 (6th Cir. 1975).[1] Because of the importance of these issues to BALIA and its members, on January 16, 1976, BALIA filed a brief *amicus curiae* on behalf of the petitioners Big Rivers Electric Corporation, *et al.*[2]

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[1] A petition for a writ of certiorari to review this decision has also been filed by the Tennessee Valley Authority (No. 75-787, October Term 1975).

[2] In response to the two *Big Rivers* petitions filed in February 1976, EPA took the position that the case is moot and that the judgment

(continued)

It is respectfully submitted that the decision below was erroneous on questions of great importance to *amicus curiae* and to other industries affected by state implementation plans. Rather than repeat here arguments which we have made previously, we will instead refer the Court to the brief *amicus curiae* filed by BALIA in the *Big Rivers* case, which appears below in the Appendix.

CONCLUSION

For the reasons set forth herein, and in our brief *amicus* in *Big Rivers*, which appears in the attached Appendix, a writ of *certiorari* should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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March 1976

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[2] (continued)
should be vacated and, in the alternative, that if the Court does not agree that the case is moot the petitions should be denied.

Although we do not wish to respond here to the Government's suggestion of mootness in the *Big Rivers* case, to our knowledge there has been no such suggestion in the present case. Further, EPA has made it clear that the Agency will be taking further actions to disapprove state plans which contain optional control features. *See* Appendix at 5.

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No. 75-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BIG RIVERS ELECTRIC CORPORATION
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, Administrator,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

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January 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-774

BIG RIVERS ELECTRIC CORPORATION
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, Administrator,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

INTEREST OF AMICUS CURIAE

The Bay Area League of Industrial Associations, Inc. submits this brief in support of petitioners Big Rivers *et al.* Both petitioners and respondent Environmental Protection Agency have consented to the filing of this brief amicus by letters which have been

presented to the Clerk of the Court pursuant to Rule 42(2).

The Bay Area League of Industrial Associations, Inc. ("BALIA") is an incorporated league of industrial corporations with manufacturing facilities located in the San Francisco Bay area. BALIA is a party to rulemaking in which the EPA has proposed formally to disapprove certain provisions in the Bay Area implementation plan solely on the grounds that it permitted ground level monitoring controls, based upon the same rationale as the agency's disapproval of the Kentucky regulation involved in this case. It is respectfully submitted that the decision below raises important questions concerning the implementation of the Clean Air Act which will have far reaching impact upon amicus curiae, its members, and other industries similarly situated.

REASONS FOR GRANTING THE WRIT

The granting of the petition for a writ of certiorari in this case is supported by several grounds that are traditionally deemed by this Court to warrant plenary review.

I. The Issues Raised by the Decision Below Are of Continuing and Overriding Importance Concerning the Implementation of the Clean Air Act

The petitioners have pointed to the significant economic impact which would be borne by consumers of electric power if the states were required in all cases to enforce only certain types of emission control regulations—"constant emission controls"—and were not permitted to adopted the combination of air pollution regulations best suited to their particular situa-

tion which would meet the national air quality standards. The impact of the decision below, however, would be felt beyond the electric power industry to the extent that it stands as precedent for the disapproval of all ground level monitoring emission controls as *per se* invalid under Section 110(a)(2)(B) of the Clean Air Act, even where such controls are demonstrably effective to reduce or limit air pollution emissions to attain and maintain national air quality standards.

Illustrative of the kind of effective ground level monitoring control which might be held invalid if the decision below were permitted to stand is San Francisco Bay Area BAAPCD Regulation 2, which the EPA has proposed retroactively to disapprove. 40 Fed. Reg. 4445 (January 30, 1975). This regulation permits industrial sources to employ certain types of ground level monitoring controls which limit emissions at all times to meet a 24-hour ground level standard which is more than three times more stringent than the EPA national air quality standard. Where this ground level standard is exceeded by an industrial source, emission control devices are required to limit emissions to meet the standard. In contrast with the intermittent control systems permitted under the Kentucky regulation disapproved in the decision below, emission rates under BAAPCD Regulation 2 are *not* adjusted upward or downward to meet changes in meteorological conditions. Rather, emissions are limited at all times to a level sufficient to meet the stringent BAAPCD standard under the worst predictable meteorological conditions .

The EPA national air quality standards for sulfur dioxide were attained in the San Francisco Bay Area as of May 31, 1972, the date that EPA approved the

California State implementation plan. 40 C.F.R. § 52.238. Computer modeling simulations and actual monitoring data submitted to EPA by amicus curiae demonstrate that the national standards have been maintained since that date and will continue to be maintained in the future by a substantial margin . These data further demonstrate that since May 31, 1972, enforcement of BAAPCD Regulation 2 has effected a substantial reduction in the sulfur dioxide emissions in the San Francisco Bay Area, and has improved air quality beyond that required under the EPA national standards. Further, very substantial additional reductions of emissions are scheduled in 1976. Millions of dollars have been spent since May 31, 1972, by San Francisco Bay Area industry to meet the requirements of BAAPCD Regulation 2.

The proposed retroactive disapproval by EPA of BAAPCD Regulation 2 is based *solely* on the fact that it provides ground level monitoring controls as an option. As stated by the Administrator in his notice of proposed rulemaking:

> "Regulations which contain an emission limitation but which permit compliance with ambient air limitations as an option to compliance with the emission limitation are not approvable." 40 Fed. Reg. at 4446.

If the BAAPCD Regulation 2 ground level monitoring control option is disapproved, the various industry members of BALIA will be required to spend additional millions of dollars for the further abatement of sulfur dioxide emissions although such additional expenditure would not be necessary to maintain the national air quality standards.

This case has an importance beyond that of amicus curiae and its members, significant as that is. In its January 30, 1975, announcement proposing disapproval of BAAPCD Regulation 2, EPA made it clear that the agency would be taking further action to disapprove all state plans which contain optional control features. 40 Fed. Reg. at 4446. The decision below thus involves a question of continuing importance under the Clean Air Act which should be reviewed by this Court.

II. The Decision of the Court of Appeals Below Restricts the Rights of the States, Recognized by This Court in Train v. NRDC, To Adopt a Wide Range of Emission Controls Provided that Such Controls Are Effective To Meet National Standards

The decision below is inconsistent with Congressional policy and misreads this Court's decision in *Train* v. *NRDC*, 421 U.S. 60 (1975), in that it sustains the EPA's disapproval of the Kentucky air pollution regulation without regard to the effectiveness of the control systems permitted under the Kentucky regulation to reduce or limit air contaminant emissions to attain and maintain national air quality standards.[1]

Section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2)(B), provides that the EPA

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[1] "The portion [of the Kentucky regulations] which was disapproved provided as follows:

> "'Where is it demonstrated . . . that an air contaminant source can apply an *alternative control strategy* which *will provide for achievement and maintenance of applicable air quality standards*, the Commission may . . . authorize such control strategy . . . .'" 523 F.2d at 18 (emphasis added).

The Kentucky regulation thus required that an applicable alternative contral strategy must be effective to attain and maintain national standards.

Administrator must determine whether a state implementation plan "includes emission limitations . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard." In *Train* v. *NRDC*, 421 U.S. 60 (1975), this Court affirmed the right of a state to adopt "whatever mix of emission limitations" it deems best suited to its particular situation "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air . . . ." 421 U.S. at 79. This Court's decision in *Train*, therefore, mandates EPA approval of state regulations where they are demonstrably effective for the timely attainment and subsequent maintenance of ambient air standards.

The *Train* decision not only permits maximum flexibility in the kind and mix of control regulations a state may adopt, but, as well, makes it clear that an approvable control strategy may provide that an individual source or group of sources may be completely excepted from the plan. 421 U.S. at 93-94, n. 28. It is within the states's discretion to determine which sources will be restricted as a part of its mix of emission limitations, provided that this mix is sufficient to attain and maintain national standards. As indicated in the *Train* decision, whether or not a specific source or group of sources is controlled by the state's emission limitation mix is not a basis for EPA disapproval of the implementation plan provision.

Further, EPA's emphasis on "constant emission controls" is also directly contrary to this Court's admonition in *Train* against "forcing" the use of technology. The agency's position, as set forth in its proposed disapproval of the Bay Area regulations, is that "con-

stant emission controls" must be applied "wherever technology is available." 40 Reg. 4446. This aspect of EPA's legal position was totally rejected by this Court in *Train*:

> " [S]o long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." 421 U.S. at 91.

The Clean Air Act as interpreted by this Court in the *Train* decision permits the states to adopt and enforce a wide spectrum of types of emission controls provided that they are demonstrably effective to reduce or limit emissions to maintain and attain national air quality standards.

III. The Court of Appeals Below Has Misread the Decision of This Court in Train v. NRDC and Has Misconstrued the Definition of "Emission Limitation" Under Section 110(a)(2)(B) of the Clean Air Act

The Court of Appeals below misconstrued the opinon of this Court in the *Train* decision to justify the *per se* disapproval of certain classes of emission controls without inquiry into their effectiveness to meet national standards. In *Train* v. *NRDC*, 421 U.S. 60, 78 (1975), this Court referred to the term "emission limitations" broadly as:

> " [R]egulations of the composition of substances emitted into ambient air from [pollution] sources .... They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards."

Although this Court did not elaborate further on this point, since it was not an issue in that case, the court

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below seized upon the single term "composition" in the foregoing quote, and redefined an "emission limitation" under Section 110(a)(2)(B) of the Act as

> "[A] rule or regulation pertaining to sulfur dioxide or any other contaminant would quality as an emission limitation only if it regulates the amount of that kind of material which may be included in the emission from a given source." 523 F. 2d at 21-22.

The court then leaped to the conclusion that only a constant emission control device on all sources would satisfy this definition.

The decision below is not supported by this Court's opinion in *Train,* and is contrary to the mandate of Congress. Section 110(a)(2)(B) of the Act refers to "emission limitations and such other measures" and is not confined to constant emission controls. EPA's state plan regulations by their own terms permit great flexibility to the states in the kind and mix of pollution control regulations which they may adopt, collectively termed a "control strategy":

> "'Control strategy' means a combination of measures designed to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard . . . ." 40 C.F.R. § 51(n).

Further, EPA's interpretation of "emission limitations" is inconsistent with Congress' careful use of the term "emission standard" in other provisions of the Act—such as Sections 111 and 112—to refer to constant emission controls. 42 U.S.C. §§ 1857c-6, 1857c-7.

Finally, it is noteworthy that the decision of the Court of Appeals in *NRDC* v. *EPA*, 489 F.2d 390 (5th Cir. 1974), *reversed on other grounds sub nom Train* v. *NRDC*, 421 U.S. 60 (1975), upon which the decision below relies, does *not* go so far as to require "constant emission controls." The distinction between "constant emission controls," *i.e.*, "emission standards," and the broader class of permissible "emission limitations" which may serve to indirectly limit the amount of emissions was clarified by the Fifth Circuit as follows:

> "[I]t is necessary to . . . define different categories of the kinds of 'enforceable controls' which may be employed to affect attainment of ambient air standards. The first, '*emission standards*' refers to standards setting specific *quantitative limits on the amounts* given individual sources may emit into the air. The second, '*emission limitations*' [as defined in Section 110(a)(2)(B) of the Clean Air Act], *is an inclusive term referring to any type of control to reduce the amount of emissions into the air.* This includes, of course, 'emission standards', but also includes a number of regulatory devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying the sulfur content of fuel that fuel-burning emission sources may burn; 'transportation controls' designed to reduce the use of motor vehicles . . . and the imposition of emission charges or other economic incentives aimed at inducing parties to reduce their emissions voluntarily." 489 F.2d at 394, n.2 (emphasis added).

In short, the decision below which mandates constant emission controls is based upon a reading of the Act which is without basis in the statutory language, EPA's own regulations, or judicial decisions.

CONCLUSION

It is respectfully submitted that the decision below was erroneous on questions of great importance to amicus curiae and to other industries affected by state implementation plans. Review by this Court is essential.

Respectfully submitted,

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January 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1029

KENNECOTT COPPER CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 526 F. 2d 1149.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1975. The petition for a writ of certiorari was filed on January 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency correctly interpreted Section

110(a)(2)(B) of the Clean Air Act, 42 U.S.C. 1857c–5(a)(2)(B), to require that state implementation plans, designed to meet national ambient air quality standards, must use continuous emission reduction techniques to the extent available and may not rely on intermittent or supplemental emission control measures on a permanent basis.

STATUTE INVOLVED

Section 110 of the Clean Air Act, as added by the Clean Air Amendments of 1970, 84 Stat. 1680, 42 U.S.C. 1857c–5, is set out in pertinent part at Pet. 2–3.

STATEMENT

The Clean Air Act, 77 Stat. 392, as amended, 42 U.S.C. 1857, *et seq.*, requires the Administrator of the Environmental Protection Agency to promulgate national primary and secondary ambient air quality standards that will protect the public from known or anticipated adverse effects of various air pollutants. Each State is primarily responsible for assuring the quality of the air within its territory and must devise a state implementation plan designed, at a minimum, to implement, maintain and enforce the national primary and secondary ambient air quality standards.

Under Section 110(a)(2) of the Act, 42 U.S.C. 1857c–5(a)(2), the Administrator is required to approve a state implementation plan if he determines, *inter alia,* that "it includes emission limitations, schedules, and timetables for compliance with such limitations * * *" (Section 110(a)(2)(B), 42 U.S.C. 1857c–5(a)(2)(B)).

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The Administrator previously had approved those provisions of Nevada's plan relating to control strategy except those involving control of sulfur oxide emissions from petitioner's McGill smelter, the only major source of such emissions in the Nevada Intrastate Air Quality Control Region (Pet. App. 3a). On June 14, 1974, the State of Nevada submitted amendments to its plan that would have required application of constant emission control technology to reduce sulfur oxide emissions from the smelter by 60 percent of the sulfur contained in the unprocessed ore. In order fully to meet all ambient air quality standards, the amendments envisioned the use of a new 750-foot tall smokestack and also would have required use of "supplementary" or "intermittent" control systems designed to control emissions further by curtailing or discontinuing production on days when meteorological conditions were conducive to ground level concentrations in excess of the ambient air quality standards. 40 Fed. Reg. 5509–5510. The Nevada amendments would have permitted use of these supplementary control systems on a permanent basis and did not require application of additional direct emission controls as they became available. 40 Fed. Reg. 5510.

On February 6, 1975, after public hearings, the Administrator disapproved Nevada's amendments and promulgated substitute sulfur oxide emission limitations pursuant to 42 U.S.C. 1857c–5(c). 40 Fed Reg. 5508, *et seq.* The Administrator determined that an 86 percent reduction in sulfur oxide emissions was necessary to meet the ambient air quality standards (Pet. App. 6a), but recognized that attainment of that emission level could not reasonably be achieved at present

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using only constant emission reduction controls. The EPA Administrator's regulations therefore provided that, as a temporary measure, petitioner may install certain already ordered constant emission reduction technology that would produce the 60 percent reduction contemplated by the Nevada amendments, and must employ such additional and supplementary control measures or other dispersion techniques as may be necessary to meet the air quality standards. 40 C.F.R. 52.1475(e)(7); 40 Fed. Reg. 5515. The Administrator determined, however, that the permanent use of such techniques could not be justified.[1] He therefore directed petitioner to carry on or support a research and development program directed at attaining compliance with those standards solely through constant emission reduction techniques, and to adopt improved technology as it becomes available for use. 40 C.F.R. 52.1475(e)(13), (15); 40 Fed. Reg. 5516, 5517. As stated in the preamble to the regulations (40 Fed. Reg. 5510):

> EPA will approve such measures as intermittent production curtailment and use of dispersion techniques, including tall stacks, as an addition to available constant control measures, until such time as the treatment of weak gas streams can be accomplished through reasonable retrofit control techniques. Evaluation of the availability of constant control techniques which may be developed in the future will be made using the same criteria

[1] In its Memorandum in Support of Petitioner, the State of Nevada overlooks the Administrator's distinction between the temporary and permanent use of supplementary control techniques. It erroneously contends that "[t]he only material difference between the [f]ederal plan and the Nevada plan" is the requirement that petitioner conduct a research program (Nev. Mem. 2).

> as were used in developing these regulations. Namely, [supplementary control systems] will continue to be allowed where permanent production curtailment, shutdown or delays in attainment of national standards are the only other alternatives.

Petitioner filed a timely petition for review of the Administrator's actions in the United States Court of Appeals for the Ninth Circuit. The State of Nevada intervened in support of petitioner. The court held that Section 110(a)(2)(B) of the Clean Air Act requires the use of constant emission reduction technology and that the Administrator therefore had properly rejected that portion of the Nevada plan that would have permitted the permanent use of intermittent controls. The court concluded that the Administrator acted within the scope of his authority "in refusing to accept intermittent controls as adequate compliance with the statute" (Pet. App. 13a).

ARGUMENT

Petitioner contends (Pet. 10–12) that the Administrator's disapproval of that portion of the Nevada implementation plan allowing permanent use of supplementary control measures exceeded his authority under the Clean Air Act. It argues that in implementing its "preferred strategy" of constant emission reductions for attaining and maintaining ambient air standards, EPA derogated from the power of the States to formulate emission control strategies, in violation of the statutory division of pollution control responsibilities between the federal and state governments. However, EPA's adoption of this strat-

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egy was not a discretionary act but a mandatory response to the manifest congressional intention that ambient air standards be met whenever possible by continuous emission control limitations.[2] Its rejection of the Nevada amendments was in strict compliance with its assigned role under the Clean Air Act. The decision of the court of appeals therefore is correct, and it does not conflict with any decision of this Court or any court of appeals.[3]

1. Section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. 1857c-5(a)(2)(B), requires that every state implementation plan include

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.

Every court that has considered this language has construed it to require the use of all available measures for continuous limitation of emissions. See *Natural Resources Defense Council, Inc.* v. *Environ-*

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[2] Thus, the State of Nevada incorrectly asserts (Nev. Mem. 3) that the Administrator's sole justification for requiring continuous emission limitations was their "convenience and ease of enforcement". This argument is also implicit in petitioner's references to the Administrator's "preferred strategy" (see Pet. 2, 5).

[3] In *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1542, argued January 21, 1976, we contended that upon judicial review of the Administrator's approval of a state implementation plan under the Clear Air Act, the court may not consider claims that compliance is economically or technologically infeasible. As we argued in that case, there is no requirement in Section 110(a)(2) of the Act, 42 U.S.C. 1857c-5(a)(2), that in deciding whether to approve a state-submitted implementation

mental Protection Agency, 489 F. 2d 390, 406–409 (C.A. 5), reversed in part on other grounds *sub nom. Train* v. *Natural Resources Defense Council*, 421 U.S. 60; *State of Texas* v. *Environmental Protection Agency*, 499 F. 2d 289, 311–313 (C.A. 5); *Big Rivers Electric Corporation* v. *Environmental Protection Agency*, 523 F. 2d 16 (C.A. 6), petitions for a writ of certiorari pending, Nos. 75–774 and 75–787.

In *Train* v. *National Resources Defense Council*, *supra*, 421 U.S. at 78, this Court stated that state implementation plans to attain and maintain national ambient air standards

> must include "emission limitations," which are *regulations of the composition* of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are specific rules to which operators of pollution sources are subject, and which if en-

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plan, the Administrator must consider whether compliance with the emission limitations therein is feasible. Accordingly, so long as the plan is sufficient to achieve ambient air standards and requires continuous emission limitations, it must be approved.

If, however, a state plan appears facially inadequate in that it could be construed to permit intermittent emission limitations, the Administrator must review it to determine whether the intermittent controls are justified. Only if the demonstration of adequacy which must accompany the submission of each implementation plan shows that constant emission controls are unavailable will the Administrator approve a plan that permits use of dispersion technology such as intermittent controls. Thus, the Administrator does not review the feasibility of compliance with a state-submitted plan where it is adequate on its face, as in *Union Electric*, but will consider feasibility only in determining whether special circumstances justify approving an apparently deficient plan that fails to include constant emission limitations necessary to obtain approval under Section 110(a)(2), resorting instead to dispersion techniques.

> forced should result in ambient air which meets the national standards [emphasis supplied].[4]

As had the Sixth Circuit in *Big Rivers, supra*, the court below correctly interpreted this statement to mean that "emission limitations" do not include regulations that merely regulate the time during which pollutants may be dispersed into the atmosphere or the altitude of the smokestack through which they are dispersed, which are the effects of intermittent or supplemental control systems (Pet. App. 10a–12a).

2. The purpose of the Clean Air Act further confirms that Congress intended to require that state implementation plans require continuous emission controls if available. National primary ambient air quality standards are those "requisite to protect the public health," 42 U.S.C. 1857c–4(b)(1); national secondary ambient air quality standards are those

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[4] To be sure, the Court in *Train* held that "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments" (*id.* at 91). But the Court was referring to modification of source-by-source emission limitations fixed by the State, which the Administrator must approve so long as the state plan as a whole provides for a mix of emission limitations from all sources sufficient to meet national air quality standards; if these limitations are sufficient, the Administrator may not raise the limitation on a particular source to force technological improvement as to that source. The Court did not thereby preclude the Administrator from withholding his approval of state implementation plans that did not employ "emission limitations" or that could be construed to permit intermittent emission controls when continuous controls were available. Nor did it prevent the Administrator from seeking to force sufficient development of technology so that ambient air standards may be met solely through emission limitation controls, rather than by supplementary techniques (Pet. App. 11a–12a n. 22).

"requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," 42 U.S.C. 1857c–4(b)(2). State implementation plans must provide for attainment and "maintenance" of these standards, 42 U.S.C. 1857c–5(a)(1). Intermittent controls, however, do not provide a sufficient guarantee that national primary and secondary ambient air quality standards will be maintained. As the court below stated (Pet. App. 11a–12a):

> Intermittent control systems (such as those restricting production, or utilizing less polluting fuels, during periods of adverse weather) do limit the amount of pollutant emitted while such controls are being applied. However, the reliability and enforceability of such controls is questionable; they may not be implemented when they are in fact needed. Moreover, there is no assurance that temporary reductions in emissions resulting from such controls will not be balanced, or even exceeded, by an increase in the amount of pollutant emitted when weather conditions improve and production is increased to make up for prior losses, or more polluting fuels are again used. Thus, intermittent controls, like tall stacks, may only disperse the pollutant rather than reduce it. Tall smokestacks disperse a pollutant through greater quantities of air; intermittent control systems disperse a pollutant through longer periods of time. Neither assures a reduction in the quantity of the pollutant eventually emitted. Under section [110(a)(2)(B)], EPA may require that assurance [footnote omitted].

Moreover, since the use of dispersion techniques merely regulates the timing or altitude, but not the quantity, of pollutants discharged into the atmosphere (Pet. App. 11a–12a), it is at odds with the policy of nondegradation in the Clean Air Act.[5] As the court of appeals stated in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 489 F. 2d at 408–409:

> Dispersion * * * techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy. The only techniques fully capable of guaranteeing non-degradation are [continuous] emission limitation techniques.[6]

3. "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight," *National Labor Relations Board* v. *Bell Aerospace Company,* 416 U.S. 267, 275, and the legislative his-

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[5] This policy requires that areas of clean air, where air quality indices are above the levels set by the national ambient air quality standards, must not be degraded, even though degradation will not reduce the quality of the air below levels specified by the standards. See S. Rep. No. 91–1196, 91st Cong., 2d Sess. 2 (1970); H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 1, 2, 5 (1970); *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253, 255 (D. D.C.), affirmed *sub nom. Fri* v. *Sierra Club,* 412 U.S. 541.

[6] The court classified both tall stacks and intermittent controls as dispersion techniques (*id.* at 394 n. 2).

tory of subsequent amendments to the Clean Air Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available (see Pet. App. 13a–22a).

Congress amended the Clean Air Act in 1974, in response to the 1973 oil embargo and energy crisis. As it passed the House of Representatives, the 1973 predecessor to the 1974 amendment, which subsequently was vetoed, permitted the permanent use of intermittent controls at certain emission sources.[7] The Conference Committee eliminated this provision and in its draft permitted intermittent controls only upon pollution sources that converted to coal, and then only as a temporary relief measure under specified conditions.[8]

In March 1974, the Administrator transmitted a new proposed bill to the House which, in pertinent part, was the same in substance as the statute eventually adopted. The Administrator also transmitted another proposal, which he did not support, that would have amended Section 1857c–5(a)(2)(B) to provide that nothing in that section was to be construed " 'to preclude use of * * * intermittent control measures.' " [9] The Administrator stated that this proposed amendment, which was intended " 'to allow the use of intermittent control strategies as a permanent

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[7] Murphy Amendments to H.R. 11450, Section 201, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 41775–41777 (1973).

[8] S. Conf. Rep. No. 93–663, 93d Cong., 1st Sess. 83–84 (1973).

[9] Letter dated March 22, 1974, from Russell E. Train, Administrator of EPA, to Hon. Carl T. Albert, Speaker of the House of Representatives, attached to H.R. Rep. No. 93–1013, 93d Cong., 2d Sess. (1974). (See Pet. App. 13a–19a.)

method for achieving compliance with stationary source emission standards' ", would " 'significantly weaken the Clean Air Act.' " The Administrator reaffirmed the contrary position taken by the Environmental Protection Agency, stating, " '[a]s in the past, EPA will contend that the intermittent controls can be used only as an expedient, temporary control measure.' " (See Pet. App. 18a.)

In the course of presenting the Conference Report on the 1974 amendment to the Senate, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and manager of the bill in the Senate, stated (120 Cong. Rec. S. 10409 (daily ed. June 12, 1974)):

> * * * [N]o one should view limited application of enforceable strategies related to this legislation as a precedent for future legislation or as a reinterpretation of the requirements of the existing law which bar the application of intermittent control strategies as a substitute for emission limitations.

When finally enacted, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246, added a new Section 119 to the Clean Air Act, 42 U.S.C. (Supp. IV) 1857c–10, which permits certain power plants and other large emission sources that convert from burning oil or natural gas to burning coal to obtain temporary relief from air pollution control requirements and thereby to use intermittent controls temporarily if certain specified conditions are met. One of the conditions is that the source in question must enter into binding contracts to acquire either a long-term supply of low-sulphur

coal or a "continuous emission reduction system." Whichever alternative is chosen, the arrangement must achieve the necessary degree of emission reduction not later than December 31, 1978. Use of intermittent controls after that date is not permitted. See Sections 119(c)(2)(B) and (C), 42 U.S.C. (Supp. IV) 1857c–10(c)(2)(B) and (C).

Since the purpose of this legislation was to encourage certain power plants to convert from oil or gas to coal and to provide relief to those plants that switched to coal because of the oil supply interruption, it is inconceivable that Congress intended to impose on such sources a greater burden than if they had not converted. Accordingly, Congress must have assumed that intermittent controls were not permitted prior to the 1974 amendment.[10]

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[10] On March 18, 1976, the House Committee on Interstate and Foreign Commerce ordered that H.R. 10498, a bill further amending the Clean Air Act, be reported favorably to the House. Section 103(a) of that proposed bill would add a new Section 121(a) to the Clean Air Act which would define the term "means of emission limitation" for purposes of that Section as "a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics) * * *." A comparable provision, defining "emission limitation" as a requirement limiting the emission of air pollutants on a continuous basis, is included as Section 33(i) of a similar bill to amend the Clean Air Act currently pending before the Senate Committee on Public Works. If adopted, these bills would remove any residual ambiguity in the expression of the congressional intention that state implementation plans must require the use of continuous emission limitations when available.

Moreover, Section 5(b) of the Senate bill would amend Section 110(a)(2)(B) of the Clean Air Act to provide that the Administrator must approve a state submitted implementation plan if, among other requirements, "it includes emission limitations, schedules, and timetables for compliance with such limita-

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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tions, and, in addition, as may be necessary, (i) to assure attainment and maintenance of such primary or secondary standard, such other measures, including, but not limited to * * * enforceable supplemental emission reduction strategies for existing nonferrous smelters * * *."

Section 121(c)(3)(A) of the House bill would provide that the owner of an existing nonferrous smelter may receive up to two five-year extensions of the date for compliance with any requirement of a state implementation plan upon a demonstration that it is necessary to use other measures, presumably including dispersion techniques, to attain and maintain national ambient air quality standards if the Administrator has determined that no "means of emission limitation" (as that term is defined above) necessary for compliance with such requirement is reasonably available.

Thus, both houses of Congress have recognized that before nonferrous smelters may, for an extended period of time, rely upon supplemental control techniques to comply with state implementation plans, the present Clean Air Act must be amended. Furthermore, the pendency of these amendments demonstrates that Congress is aware of the problems of the smelter industry and is considering whether special treatment is appropriate. If the Act is duly amended along the lines suggested by the proposed legislation, the question presented in this case may be of no prospective significance.

U.S. GOVERNMENT PRINTING OFFICE: 1976

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 6 1976
MICHAEL RODAK, JR., CLERK

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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April 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

In its petition for a writ of certiorari, Kennecott Copper Corporation showed that the decision of the court below is in conflict with this Court's decision in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and that it decided an important issue of Federal law that should be finally resolved by this Court. The brief in opposition filed on behalf of the respondent Administrator of the Environmental Pro-

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tection Agency makes no substantial effort either to address this conflict in decisions or to dispute the importance of this case. In short, the brief in opposition only confirms that the issuance of a writ of certiorari by this Court is amply warranted.

1. In *Train* v. *NRDC*, *supra*, this Court declared that, so long as a State's implementation plan makes provision for attaining and maintaining national ambient air quality standards, EPA has no authority under the Clean Air Act to challenge the particular control strategy adopted by the State. The court below, however, held that EPA may indeed disapprove a State plan, even though it provides for meeting the national standards, if it does so by reliance on control strategies other than the one preferred by EPA. Perhaps the most remarkable thing about EPA's brief in opposition is its almost total failure to come to grips with this irreconcilable conflict between the Ninth Circuit's decision and the definitive ruling so recently handed down by this Court.

About all EPA has to say about this Court's decision in *Train* v. *NRDC* is to argue that the Court's description of "emission limitations" therein clearly excluded supplementary-control and tall-stack techniques (Br. Opp. 7-8). To begin with, it is difficult to imagine that this Court would have announced such a constricted definition of "emission limitations" at the same time it was affirming the States' freedom to adopt whatever control strategies are best suited to their local needs. Furthermore, as we pointed out in the petition, the cited passage in the Court's opinion in fact contradicts EPA's narrow view (Pet. 9). Far from containing the kind of restrictive qualifications for which EPA contends, the only requirement it imposes on emission

limitations is that they "result in ambient air which meets the national standards" (421 U.S. at 78).

EPA's thesis seems to be that, in describing emission limitations as "regulations of the composition of substances emitted" (*ibid.*), this Court cannot have intended to include "regulations that merely regulate the time * * * or the altitude" at which pollutants are released (Br. Opp. 8). That hardly describes the Nevada plan, in which supplementary controls and a tall stack are integral parts of an overall control strategy that provides for a continuous reduction in sulfur emissions of *at least 60 percent* (see Br. Opp. 3). Thus, not only does the Nevada plan contain "emission limitations" as defined by this Court, but it also would effect the "constant emission reductions" required by EPA's preferred strategy. The Ninth Circuit's contrary holding represents an unacceptable interference with the States' exercise of their assigned responsibilities under the Act.[1]

2. EPA next argues that supplementary control systems should not be considered "emission limitations" within the meaning of the Clean Air Act because they "do not provide a sufficient guarantee that national primary and secondary ambient air quality standards will be maintained" (Br. Opp. 9). This contention, of course, belies EPA's insistence that, in resisting the use of such control techniques, it is not primarily concerned

[1] EPA's attempt (Br. Opp. 8 n. 4) to explain away this Court's disapproval of "forcing further technological developments" where "national standards are being attained and maintained" (421 U.S. at 91) is unpersuasive. The gloss that EPA would apply to the Court's words would render them virtually meaningless—a consummation devoutly to be wished by EPA but scarcely in accord with the will of Congress.

with administrative convenience and ease of enforcement (see Br. Opp. 6 n. 2). It must also be observed that this type of argument "goes more to the wisdom of what Congress has chosen to do than to determining what Congress has done," *Train* v. *NRDC, supra,* 421 U.S. at 92.

What is more to the point, however, is the fact that EPA itself has repeatedly confirmed the reliability of supplementary control systems. An EPA Staff Paper relied on by the court below (Pet. App. 12a n. 24) states that "an ICS [intermittent or supplementary control system], when properly designed and diligently and conscientiously operated, can be used to attain air quality standards with the same reliability as a CCS [constant control system]," 119 Cong. Rec. 19189, 19190-91 (1973). Similarly, EPA has publicly declared that "such [supplementary control] systems can be designed and operated in such a way as to be a reliable means of attaining and maintaining national standards in selected situations," 38 Fed. Reg. 25697, 25700 (1973).

Thus, the worst that can be said of a supplementary control system is that—like any technologically advanced system—its reliability depends on how well it is designed and how conscientiously it is operated. This means that EPA and the States must frame regulatory guidelines and devise enforcement techniques to insure that only properly designed systems are installed and that they are efficiently operated and carefully maintained. That EPA may find this administrative responsibility inconvenient or perhaps even onerous is no reason for the agency or the courts to rewrite the Act.

The foregoing comments apply equally to EPA's argument that "dispersion techniques" (the non-statu-

tory label EPA has affixed to supplementary-control and tall-stack techniques) are inconsistent with "the policy of nondegradation in the Clean Air Act" (Br. Opp. 10). In the first place, the factual premises on which this argument is based are false; for example, the EPA Staff Paper cited above conceded that, because a pollutant that is being dispersed is also being diluted, "the assumption that *total environmental damage decreases with increased pollutant dispersion* is reasonable," 119 Cong. Rec. at 19193 (emphasis supplied). Furthermore, to the extent that the Clean Air Act embodies a "policy of nondegradation," EPA and the States have ample means of enforcing it against all sources, regardless of the control techniques they are employing.[2]

3. EPA goes on to claim that "the legislative history of subsequent amendments to the Clean Air Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available" (Br. Opp. 10-11). That EPA must place such reliance on "subsequent legislative history" only underscores the fact that nothing in either the language or the legislative history of the provision involved in *this* case (Section 110(a)(2)(B) of the Act) supports EPA's position. Moreover, this Court has repeatedly cautioned that the meaning of a statute cannot be altered by subsequent statements of legislators and agency officials or by such ambiguous

[2] In fact, EPA has already promulgated comprehensive "nondegradation" regulations, 39 Fed. Reg. 42510 (1974), the validity of which is being litigated in *Sierra Club* v. *EPA* (D.C. Cir. Nos. 74-2063, *et al.*). Among the issues involved in that litigation is whether Congress did indeed write the so-called "nondegradation policy" into the Act, a question on which this Court (having divided evenly when the issue was last before it) has not yet ruled.

actions as the failure to adopt proposed amendments, see, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Particularly wide of the mark is EPA's argument that the 1974 amendment to the Clean Air Act added by the Energy Supply and Environmental Coordination Act supports the agency's interpretation of Section 110 (a)(2)(B) (Br. Opp. 12-13). As EPA correctly states, the 1974 amendment was adopted to provide relief from pollution control requirements for certain large emission sources that switch from oil or gas to coal because of the fuel shortage. Under its terms, EPA may allow such sources to employ supplementary control systems for a limited period, subject to certain restrictive conditions. EPA views the narrowness of those conditions as evidence that Congress disapproves of the use of supplementary control systems.

This argument totally misconceives the thrust of the 1974 amendment. The cited provision permits EPA to *force* supplementary control systems on any State in which an affected source is located, regardless of whether the State wishes to use such systems as part of its control strategy. Since the grant of such a preemptive power to EPA is so at odds with the basic policy of the Act, Congress naturally placed stringent conditions on its use. It did so, not to curtail the State's choices of control strategies, but to restrict EPA's power to *override* those choices. Thus, far from reflecting legislative rejection of a particular control technique, the 1974 amendment represents a clear reaffirmation by Congress that it is the *States* that are

to select the means for controlling pollution in each local area, not EPA.

4. Finally, EPA points to several proposed amendments to the Clean Air Act now pending in Congress, suggesting that they support EPA's position on the merits and that their adoption might rob this case of any prospective importance (Br. Opp. 13-14 n. 10). Neither of these contentions is meritorious, for the provisions to which EPA refers have no direct bearing on the present case. The provisions in the House bill cited by EPA, like the 1974 amendment just discussed, would merely authorize temporary relief from State-imposed emission controls; they would not enlarge or diminish the States' discretion to decide what controls to impose in the first place, which is what this case is concerned with.

The cited provisions of the Senate bill would somewhat amplify the statutory requirements governing State implementation plans, but the issue posed here—whether the Administrator may disapprove a State plan because he disagrees with the means selected by the State for *meeting* those statutory requirements—would remain unaffected by their enactment. Thus, while the Senate bill specifically sanctions State adoption of supplementary-control strategies for existing copper smelters, its enactment would not, so far as we are aware, alter EPA's position that it is free to impose time limitations and technology-forcing conditions on the use of such strategies, as it did here. Indeed, if the proposed amendments have any significance at all for present purposes, it is that they emphasize the continuing need for this Court to confine EPA to its proper role under the Act. That, of course, *is* what this case is about.

CONCLUSION

The brief in opposition filed on behalf of EPA has in no way reconciled the sharp conflict between the decision below and this Court's authoritative opinion in *Train* v. *NRDC*. Nor has it challenged the broad importance of the issues decided by the court below. Accordingly, for the reasons stated in the petition and this memorandum, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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April 1976